

R.D. #0001-06
West Orange, NJ

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

BLACKBURN DEVELOPMENT COMPANY, LLC¹

Employer

and

Case 22-RC-12673

TEAMSTER UNION LOCAL 418

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION:

The Petitioner seeks to represent a unit of all full-time superintendents, laborers, painters, tilemen and groundskeepers employed by the Employer at its West Orange, New Jersey facility,² excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act.

The Petitioner seeks to include the head superintendent in the unit, a position that the Employer contends is supervisory and should be excluded from the unit.

¹ The Employer's name appears as amended at the hearing.

² The Employer appears to operate multiple apartment complexes under its auspices, one of which is the West Mill Apartments, located in West Orange, New Jersey, the only facility at issue here.

Based on the following facts and analysis, I find that the head superintendent has not been shown to possess supervisory indicia and thus shares a community of interest with the petitioned for unit. Therefore, the head superintendent is included in the unit.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction therein.⁴

3. The labor organization involved claims to represent certain employees of the Employer.⁵

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

All full-time superintendents and the head superintendent, laborers, painters, tilemen and groundskeepers employed by the Employer at its West Orange, New Jersey facility, excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act.

³ Briefs filed by the parties have been duly considered.

⁴ The Employer is a New Jersey corporation engaged in the operation of an apartment complex at its West Orange, New Jersey facility, the only facility involved herein.

⁵ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

1. The Employer's Operation

The Employer manages multi-apartment complexes, providing the maintenance and groundskeepings functions for those facilities. The West Mill Apartment multi-apartment dwelling complex involved herein has a staff of 17 maintenance employees. Manager Stephen Sutphen oversees the employees on a daily basis. Below him are the head superintendent Sandino Hernandez and the other superintendents and ultimately the remaining employees. There is no record evidence of how many laborers, painters, tilemen and groundskeepers are employed in each title at this facility. While there is no explicit evidence of how many superintendents are employed in addition to the head superintendent, Hernandez testified that one superintendent makes \$11.00 per hour; one makes \$12.00 per hour, the same rate as Hernandez, and one makes \$14.64 per hour, leaving the impression that there are three individuals in the title of superintendent.

2. The Supervisory Issue

As noted above, there is only one issue before me: whether Sandino Hernandez is a statutory supervisory. The evidence offered at hearing was conflicting, with the two Employer witnesses offering testimony that Hernandez, who has been a head supervisor for 5-6 months, possesses some supervisory indicia, such as the authority: to direct the work of maintenance staff, including the other superintendents; to purchase material on behalf of the Employer; to train and discipline employees; and to make recommendations regarding the hiring and firing of employees - although no such opportunities have occurred during Hernandez's short tenure as head superintendent. The Employer also cites an instance of

what it asserts is Hernandez's authority to discipline an employee by sending him home and to adjust grievances by intervening in a dispute between two employees.

Hernandez, who was hired as a superintendent in June 2004, denied that he possessed any supervisory indicia. He testified that he does not hire or fire nor has he ever been told that he could effectively recommend such actions. He has no authority to promote, give or recommend a raise, layoff or discipline employees. All of his job functions as head superintendent remain the same as they had been when he was a superintendent, i.e., he does plumbing, electrical and carpentry work on a daily basis, as well as clearing apartments that have become empty. He contends that he is the head superintendent simply because he functions at a higher skill level than any of the other superintendents, not because he has enhanced job responsibilities.

According to Hernandez, job assignments are usually made by the Manager, who either does so directly to the employees or through telephone communication with the rental agent, by Hernandez, or, in their absence, by any of the superintendents.⁶ When it comes to purchasing supplies, Hernandez can only do so with the express permission of the Manager. The one time Hernandez purchased supplies on his own, without prior managerial permission, he was told by the store clerk that he would not be allowed to do so in the future without express managerial approval. In that regard, Hernandez noted, he has the same lack of authority as the other superintendents.

Hernandez does not evaluate other employees' work and corrects it only when expressly instructed to do so by the Manager. Among his duties is apartment clearance,

which he has since the time he started working for the Employer as a superintendent. Clearing an apartment requires him to note what is missing, broken or dirty and to assign a monetary value to the repair, replacement or cleaning, said monies to be deducted from the tenant's security deposit. Hernandez testified that the monetary values he has put on clearance forms have been scratched out and replaced, presumably by the Manager. Although the Employer claimed that only the Manager and the head superintendent can clear apartments, Hernandez noted that the clearance form itself provides for signature by the Manager or superintendent, not head superintendent.

The only incident of alleged discipline by Hernandez involved the clearance of an apartment. When Hernandez was instructed by Manager Sutphen to clear an apartment, he informed Sutphen that there was still carpeting in the apartment. Sutphen instructed Hernandez to have the laborers remove the carpeting. When Hernandez relayed this instruction to the laborers, one of them refused to do it. Rather than remove the carpeting, the laborer left for the day. Hernandez denies sending the laborer home, saying he had no authority to do so and no ability to prevent the employee from leaving.

The Employer took no disciplinary action against this employee and in fact paid him for the time he was not there. Thus, even if Hernandez had sent the laborer home, the Employer undercut the authority it contends Hernandez has by paying the employee for time he did not work.

As to the Employer's claim that Hernandez intervened in an argument between two employees, thereby adjusting their grievance or at the very least giving them the impression

⁶ The record is devoid of any evidence of how job assignments are made other than a single statement by the Employer that they are based on skill level. Hernandez denied that there was any consideration of skill and

that he had the ability to adjust their grievances, Hernandez countered that he did what he did as a human being, i.e., he attempted to intervene between two fellow employees who were arguing, not because he had any specific authority.

The Employer acknowledged that there is no written job description for the superintendent and/or head superintendent position, nor did the Employer provide record evidence that only the Manager and the head superintendent sign the clearance sheets. The Employer through its witnesses acknowledged at hearing that Hernandez was not given any specific instructions as to a change in duties when he became head superintendent nor did the Employer know if the \$1.00 an hour increase it claimed to have initiated for him was implemented.

III. ANALYSIS AND CONCLUSION

I find that the Employer has not sustained its burden to show that Sandino Hernandez is a supervisor.

Section 2(11) of the Act defines a supervisor as: Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁷

As the Board has noted in numerous cases, the statutory indicia outlined in Section 2(11) are listed in the disjunctive; only one need exist to confer supervisory status on an individual. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989); *Ohio*

indicating that jobs were assigned on a first-in, first-out basis.

⁷ Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any of the 12 listed supervisory functions; their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and their

River Co., 303 NLRB 696, 713 (1991); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Groves Truck & Trailer*, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981). In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held: "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *Id.* at 724, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The Supreme Court has stated: "Many nominally supervisory functions may be performed without the 'exercis[e] of] such a degree of ... judgment or discretion ... as would warrant a finding' of supervisory status under the Act." *Id.* (citing *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949)).

The legislative history instructs the Board not to construe supervisory status too broadly, because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital*, *supra*, 320 NLRB at 725; *Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985). The burden of proving that an individual is a statutory supervisor rests with the party asserting it. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1863 (2001). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status.

authority is exercised "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc., et al.*, 532 U.S. 706, 713 (2001).

Quadres Environmental Co., 308 NLRB 101, 102 (1992) (citing *Sears Roebuck & Co.*, 304 NLRB 193 (1991)). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990) (quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)).

The Employer claims that Hernandez should be excluded from the petitioned for unit based on the testimony of its witnesses, most particularly that of Manager Sutphen, who previously held the head superintendent position for two years. According to Sutphen, as head superintendent, he exercised the authority to: discipline employees; responsibly direct the work of subordinates; assign work; train and evaluate employees; resolve employee grievances; make sizeable purchases without managerial approval and assess security deposits for damages. Moreover, he was the managerial presence when the Manager was absent. However, as the Employer aptly notes in its brief:

Job titles *per se* are not determinative of job duties and, therefore, not dispositive of whether one is a supervisor or not. *Heritage Broadcasting Co. of Michigan v. NLRB*, 308 F.3d 656, 662 [6th Cir. 2002]... Thus in the absence of contrary evidence, sharing the same job title is not automatically conclusive of the same job duties. *Ibid*. The court looks to actual duties, not merely the job title or classification, to determine if an employee is a supervisor. *International Longshoremen's Association v. Davis*, 476 U.S. 380, 404, n. 13 (1986), citing *Winco Petroleum Co.*, 241 NLRB 1118 (1979).

I cannot find that Hernandez is a supervisor based on Sutphen's testimony as to how he acted when he held the head superintendent position. Sutphen acknowledged that he gave no specific instructions to Hernandez when he changed his title to head superintendent and there were no written job descriptions delineating the functions of the two job titles. Moreover, the record reveals that there was no head superintendent at that facility between

the time Sutphen became Manager in February 2003 until Hernandez, who was hired in June 2004, was made head superintendent in about mid-2005. Thus Hernandez would have had no opportunity to observe how Sutphen performed in the position of head superintendent.

The Employer, which asserts that Hernandez is a statutory supervisor and therefore bears the burden of proving supervisory status, presented no evidence that Hernandez adjusted the grievances of employees as a supervisor, held himself out to employees as such or was perceived as a supervisor by other employees. To do so, the Employer could have called employees, but did not, to testify that that was how they perceived Hernandez. Given the conflicting testimony, the claim of supervisory status must be construed against the Employer in the absence of any supporting objective evidence.

Accordingly, based upon the foregoing and the record as a whole, I find that Sandino Hernandez is not a supervisor as defined by the Act and I shall include him in the petitioned-for unit.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained

their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **Teamsters Union Local 418**.

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **February 13, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **February 21, 2006**.

Signed at Newark, New Jersey this 6th day of February, 2006.

/s/Gary T. Kendellen

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